No. 12763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

A. A. SEE and C. M. COSTNER, Co-partners, doing business as COSTNER & SEE,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANTS

J. CHARLES DENNIS
United States Attorney

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OFFICE AND POST OFFICE ADDRESS:
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BRIEF OF APPELLANTS

JURISDICTION

The jurisdiction of the District Court is conferred by Sections 2(a) (6), Title III of the Second War Powers Act (56 Stat. 176, 50 U.S.C. App. 633) Section 7(a) and 7(c) of the Veterans Emergency

Housing Act of 1946 (60 Stat. 207, 50 U.S.C. App. Sec. 1821 et. seq. and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C. 1345).

The jurisdiction of this Court is conferred by Sec. 1291, Title 28, U.S.C.

PRELIMINARY STATEMENT

This is an appeal from a judgment of dismissal entered by the United States District Court for the Western District of Washington, Northern Division, in a Veterans Housing case, without trial and after argument and submission on appellees' motion to dismiss.

This civil action was brought by the United States of America under the provisions of Section 2(a) (6), Title III of the Second War Powers Act (56 Stat. 176, 50 App. U.S.C. 633), Sections 7(a) and 7(c) of the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App. Sec. 1821 et seq.) and Section 24 of the Judicial Code (54 Stat. 143, 28 U.S.C.A. 41). The action was brought to require the appellees to make restitution of overcharges above the maximum ceiling price set by the Federal Housing Administration in violation of priorities Regulation 33, issued pursuant to the Veterans Emergency Housing Act of 1946, *supra.*

Under the provisions of Title III of the Second War Powers Act of 1942, as amended, (56 Stat. 176, Title 50 App. U.S.C.A., Section 633) and Executive Orders issued thereunder, the Civilian Production Administration issued Priorities Regulation 33, effective January 16, 1946. Subsequently, on August 27, 1946, the Housing Expediter in Housing Expediter Priorities Order 1 (11 F.R. 9507) delegated to the Civilian Production Administration, the priorities and allocation powers contained in Sections 4 and 7 of the Veterans Emergency Housing Act of 1946. The Civilian Production Administration exercised such powers in the issuance of amendments to Schedule A of Priorities Regulation 33, and said regulation was, by virtue of said amendment, after August 27, 1946, continued in effect under the authority of both the Second War Powers Act of 1942, as amended, and the Veterans Emergency Housing Act of 1946. Subsequently, pursuant to the provisions of Housing Expediter Priorities Order 5, effective April 1, 1947 (12 F.R. 2111) and Executive Order 9836 (11 F.R. 1939), the Housing Expediter continued in effect said Priorities Regulation 33 under the Veterans Emergency Housing Act of 1946 above, until December 31, 1947.

When, pursuant to the provisions of Priorities Regulation 33, the appellees made application for pri-

orities assistance in securing materials to construct the dwellings mentioned in the complaint, they covenanted that they would sell the said dwellings at or below the maximum sales prices approved by the Federal Housing Administration. . .

Thereafter, these dwellings were constructed under the regulation and were sold to the two individuals mentioned in the complaint while the regulation remained in effect. The dwellings were sold at prices in excess of the approval maximum sale prices ($1750.00 each in excess).

Appellant's complaint, which prays for restitution for the amount of the overcharges, is a suit brought by the Government, the nature of which is to enforce compliance on the part of appellees and to compel appellees to repay that which has been illegally acquired.

THE MOTION TO DISMISS

The motion to dismiss was on the following grounds:

1. That the complaint fails to state facts sufficient to constitute a cause of action.
2. That the Court does not have jurisdiction of the parties nor the subject matter.
3. That the plaintiff is not entitled to the relief prayed for or any relief.

4. That the action was not commenced within the time limited by law. (R. 12a)

The District Court neither rendered an oral nor written opinion, but merely announced that appellees' motion was granted, after having taken it under advisement, so we are without benefit of the trial court's views in the matter, except we may say that during oral argument on the motion, the court expressed himself of the belief that the Government had no right to maintain such an action and refused to follow the ruling of the late Judge Black in similar proceedings had in the Northern Division of the Western District of Washington, who had previously denied such motions to dismiss.

For the purposes of the motion, all of the well pleaded facts are admitted, as of course so that we have here nothing but questions of law.

The District Court entered judgment September 12, 1950, which, in part, reads:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' motion for dismissal filed herein should be and the same is hereby granted; and the above entitled action and all causes of action therein set forth be and the same are hereby dismissed." (R. 11)

Notice of appeal was filed November 10, 1950. (R. 12).

STATEMENT OF THE CASE

Appellees A. A. See and C. M. Costner are co-partners, doing business as Costner & See at Renton, King County, Washington, and on May 22, 1946, made written application to the United States Production Administration, on a printed form for that purpose, under Priorities Regulation 33, as amended, Veterans Emergency Program for the construction of two five-room dwellings, including garages, to be constructed by them on Tract 9, Highland Addition to the Town of Renton, to be sold to veterans of World War II at the maximum sales price per complete unit, including the land of $6,750.00 each, furnishing at said time outline specifications to the Federal Housing Administration. The application was granted August 26, 1946, by the Federal Housing Administration, and Priority No. 88-127-033 was assigned thereto, which priority was acknowledged in writing by appellee A. A. See, September 9, 1946, and thereafter and on September 16, 1946, said construction was inspected by a representative of the F. H. A. and at that stage approved.

For its first cause of action appellant alleged in the complaint that on the 11th day of February, 1947, an agent of appellees entered into an agreement in writing with one Lovell S. Sherin, a veteran qualified

to purchase by the terms of which, subject to the approval of the owners, appellees herein, Sherin paid to said agent the sum of one hundred dollars, earnest money, and appellees thereupon agreed to sell, and Sherin agreed to buy from appellees, one of the dwelling houses mentioned for the sum of eight thousand five hundred dollars, the dwelling in question being located on the North 45 feet of the South 90 feet of Tract 9, Highland Addition to the Town of Renton, the terms of sale being one thousand dollars down payment (including the $100.00 earnest money), balance of seven thousand five hundred dollars, subject to approval of a G. I. loan; seller (appellees) to complete construction of the house in accordance with the terms set forth on the reverse side of said earnest money receipt, which terms were:

> "Seller to complete garage, build walkways, and front and back entrance to sidewalks. Furnish shades for entire house. Furnish light fixtures for entire house. Build a rockery in front of the house and place oil tanks underground. Backfill to be graded to level with top of basement stairwell. Repair basement and waterproof same. Build small overhead porch over front steps." (R. 3)

That appellees approved the sale by affixing their respective signatures to said earnest money receipt, well knowing at said time that the maximum price they could lawfully charge and receive for this prop-

erty was the sum of six thousand seven hundred and fifty dollars.

The complaint further alleges that through the Renton Branch, People's National Bank of Washington, a G. I. loan of seven thousand five hundred dollars was negotiated and obtained by Lovell S. Sherin, the veteran, being V. A. Loan No. 1015, which sum, together with one thousand forty-six dollars, furnished by Sherin, was paid over to Wallin & Edwards, as agents for appellees, and appellees delivered to Sherin a statutory warranty deed to the premises described, which was duly recorded in the office of the Auditor of King County, Washington, under Auditor's fee No. 3679578, March 27, 1947, and recorded in Vol. 2614 Deeds, page 492, and a mortgage on said premises was executed by Sherin and wife for the sum of seven thousand five hundred dollars.

It is further alleged in the complaint that said sale was consummated in violation of the maximum sale price fixed by the Federal Housing Administration and Priorities Regulation 33, in that the sale price so charged and received exceeded the maximum sale price by the sum of one thousand seven hundred and fifty dollars, in which sum appellant sought restitution for the benefit of said veteran.

The second cause of action alleges similar facts

in connection with the sale of the other house, on which the same maximum sales price was fixed. The sale being to one Robert Collins, a veteran of World War II, on the 27th of February, 1946, covering the South 45 feet of Tract 9, Highland Addition to the Town of Renton, the terms of sale being the same as the sale to Sherin, and the overcharge being in a similar amount.

The prayer of the complaint was as follows:

1. On its first cause of action, for the benefit of Lovell S. Sherin, restitution in the sum of $1750.00.
2. On its second cause of action, for the benefit of R. W. Collins, restitution in the sum of $1750.00.
3. For its costs and disbursements and such other and further equitable relief as to the Court seems meet and proper. (R. 9)

To this complaint appellees interposed a motion to dismiss (R. 8-9) upon the following grounds:

1. That the complaint and each separate cause of action therein fails to state sufficient facts to constitute a cause of action against defendants.
2. The Court does not have jurisdiction of this action or the subject matter.
3. That the plaintiff is not entitled to the relief prayed for, nor entitled under the law to maintain said action.
4. That this action and each separate cause of

> action therein, being for the benefit of private individuals therein named, is banned by the applicable Statute of Limitations and has not been brought within the time limited by law; which appears from the allegations of the complaint.

This motion is based upon the files and records herein and is made pursuant to Rule XII Federal Rules of Procedure. (R. 12a)

ASSIGNMENT OF ERRORS AND STATEMENT OF POINTS

1. The District Court erred in granting defendants' motion to dismiss and entering an order of dismissal because:

(a) The Court has jurisdiction of both the parties and the subject matter.

(b) The complaint states a cause of action entitling the plaintiff to the relief prayed for.

ARGUMENT

Section 2(a) (6), Title III of the Second War Powers Act provides:

> "The district courts of the United States * * * have jurisdiction of violations of this sub-section (a) or any rule, regulation, or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this sub-section (a) to enforce any liability or duty created by or to enjoin any violation of this subsection

(a) to enforce any liability or duty created by or to enjoin any violation of this sub-section (a) or any rule, regulation, order or subpoena thereunder whether heretofore or hereafter issued."

Section 7(a) of the Veterans Emergency Act of 1946, provides:

"Whenever, in the judgment of the Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 5 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Expediter that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order, may be granted, and if granted shall be granted without bond."

These sections are parallel in scope and the language to Section 205(a) of the Emergency Price Control Act of 1942, as amended. (50 App. U.S.C., Sec. 925(a).

It is charged by appellant that the defendants (appellees) sold these two dwellings at prices in excess of the approved maximum sales prices.

The motion to dismiss is based upon the denial by appellees, concurred in by the District Court, that the Government has a right to institute the action, and, moreover, even if so, said action is barred by

limitation and particularly in view of the fact that the Government is asking that restitution be made of the overcharges in each case to the purchaser.

The motion, on this ground, should have been denied for the reason that under all authority, the Government is a proper party and is here in its sovereign capacity to compel the performance of duties or the carrying out of obligations in the public interest, and it is a familiar doctrine that limitation bars do not run against the Government. Moreover, in analogous cases the Courts have so held.

Virginia R. Co. v. System Federation, 300 U.S. 515;
Hecht Co. v. Bowles, 321 U.S. 321, 329.

Under this broad, equitable jurisdiction, the Supreme Court of the United States has held that an order granting restitution of overcharges to the purchaser is a proper exercise of the statutory authority. In *Porter v. Warner Holding Company*, 328 U. S. 395, the Court, in a case involving restitution of excessive rents under the Emergency Price Control Act, stated that such an order is proper either as an equitable adjunct to an injunction decree or "as an order appropriate and necessary to enforce compliance with the Act." In defining the scope of this jurisdiction, the Court said, on page 400, that:

"Section 205 (a) anticipates orders of that character, although it makes no attempt to catalogue the infinite forms and variations which such orders might take. The problem of formulating these orders has been left to the judicial process of adopting appropriate equitable remedies to specific situations. *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194. In framing such remedies under Sec. 205(a) courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interest while giving necessary respect to the private interests involved. The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. *Clark v. Smith*, 13 Pet. 195, 203. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purpose."

The applicability of the above quoted language to the housing regulations and statutes has been sustained in cases where the courts ordered restitution of overcharges in the sale of veterans houses obtained in violation of Priorities Regulation 33. *United States v. Carter*, 171 F. (2d), 530.

Restitution may be granted independently of an injunction prohibiting further violations and thus, the fact that the sales price ceiling has been removed or that the statute has expired does not preclude the issuance of a restitution order. *Bowles v. Skaggs*,

151 F. (2d) 817; *United States v. Carter*, supra; *Nesseth v. Creedon*, 80 F. Supp. 269.

The one-year statute of limitations in Section 7 (d) of the Veterans Emergency Housing Act of 1946 does not apply to a suit by the Government for restitution under Section 7(a).

The Second War Powers Act contains no limitation of time for bringing a suit to enforce a liability under the Act.

Keele v. Holt, 171F. (2d) 480.

Section 7(d) of the Veterans Emergency Housing Act of 1946 sets up a one-year statute of limitations for suit by a purchaser for overcharges. This is parallel to the one-year statute of limitations in Section 205(e) of the Emergency Price Control Act of 1942, as amended.

The fact that Section 7(d) of the Veterans Emergency Housing Act, as Section 205(e) of the Emergency Price Control Act, authorizes an aggrieved purchaser to sue, within the statutory period, to recover the amount of the overcharge, does not conflict with the granting of a restitution order in a suit initiated by the Government. These sections establish the means whereby individuals may assert their private right to damages in an action at law and in no way

conflict with the jurisdiction of a court of equity under Section 7(a) and Section 205(a) of these statutes, to issue such other orders as may be necessary to vindicate the public interest and to compel compliance with the statute. *Porter v. Warner Holding Company, supra.* An order of restitution is not a judgment for damages or for penalties and is not inconsistent with these remedies. It compels compliance and requires restoration of the *status quo* which falls within the recognized power of a court of equity. *Bowles v. Skaggs, supra.*

And the fact that an action for damages by a purchaser as a result of an overcharge may be barred in a suit at law does not preclude a court from granting restitution under its equity powers in a suit by the Government. *Creedon v. Randolph,* 165 F. (2d) 918.

In *Blood v. Fleming,* 161 F. (2d) 292, which was an action for restitution brought under Section 205 (a) of the Emergency Price Control Act, the Court said:

> "The limitations upon the powers of the Court to proceed under the provisions of this Section are governed by equitable considerations. Whether an action may be maintained under this Section is not controlled by the one-year limitation set up in Section 205(a)."

Thus, it is clear that the one-year statute of limitations set up for actions at law in Section 7(d) of the Veterans Emergency Housing Act of 1946, in no way limits the Government in an action for restitution in equity under Section 7(a). See also *Creedon v. Randolph, supra.*

In bringing this action under Section 7(a) of the Veterans Emergency Housing Act of 1946, the United States is not suing on behalf of the purchasers.

The United States is the real party in interest. The action is one which has been brought in the public interest, to enforce obligations running from the appellees to the Federal Government and to compel compliance with a Federal regulation and statute pursuant to which the regulation was in effect. The duty and responsibility which the appellees assumed in the construction of houses pursuant to a priorities application has been described as being in the nature of a contractual obligation to the Government. *United States v. Duke Building Corp.*, 79 F. Supp. 681. The fact that, under the statutory scheme, it was intended that certain benefits would inure to veteran purchasers of priority-constructed houses, does not make this a suit brought on behalf of third parties.

As was said by the Court in *Creedon v. Randolph, supra,* in a suit under a provision of the Emergency

Price Control Act which is substantially identical with the language of Section 7(a) of the Veterans Emergency Housing Act:

> "The remedy invoked under Section 205(a) appertains only to the Administrator as the representative of the Government in the enforcement of this law. That to require restitution of overcharges tends to enforce the law prohibiting them, no one would deny. That it operates to confer a benefit on the tenant, who has not seen fit to act in her own behalf, does not detract at all from the enforcement effect nor alter its nature."

Since the United States is acting in its own interest in maintaining this suit, the claim that the one-year period of limitation within which suit may be instituted by a purchaser under Section 7(d) is applicable to the instant case is without merit. While the action under Section 7(d) is an action at law, the instant one under Section 7(a) is a suit in equity. The United States Supreme Court in the case of *United States v. Beebe*, 127 U.S. 338, 344, said this:

> "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest is established past all controversy or doubt."

The United States may bring the action as plain-

tiff without joining the purchasers as necessary parties.

It is a long established rule that when the United States acts through the agency of a wholly owned corporation, it may sue in its own name without the joinder of the corporation.

In *Fleming v. Baum, supra,* the Administrator of the Office of Temporary Controls, a predecessor of the Housing Expediter, brought an action for restitution of overcharges obtained in violation of Priorities Regulation 33. A motion was made to substitute the United States of America in lieu of the Administrator. In granting the motion, the Court said:

> "The motion to substitute the United States of America as party plaintiff in lieu of Philip B. Fleming, Administrator of the Office of Temporary Controls, should be granted. The United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights *(United States v. Cooper Corporation,* 312 U.S. 600, 604). The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. *(Cotton v. United States,* 11 How. 229, 231, following in *United States ex rel Marcus v. Hess,* 317 U.S. 537, 550).

> The United States may substitute itself in place of any agent or agency acting on its behalf whether a corporation or individual. It seems well settled that when the United States acts through the agency of a wholly owned corporation, it may sue in its own name for the protection of its interests, without the joinder of the corporation. *(Insurance Company of North America v. United States,* C.C.A. 4, 159 F. (2d) 699, 702; see also *United States v. Summerline Ancillary Administratrix,* 310 U.S. 414)."

Many cases have sustained the right of the United States to sue in its own name under the housing statutes and regulations for restitution of overcharges without joining the purchasers as parties plaintiff.

United States v. Carter, supra;

United States v. Duke Building Corporation, supra;

United States v. Tyler Corporation;

See also *Porter v. Warner Holding Co., supra.*

The District Court, therefore, erred in granting appellees' motion to dismiss and its judgment should be reversed.

Respectfully submitted,

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